

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 GARY CASTERLOW-BEY,

12 v.
13 Plaintiff,

14 GOOGLE.COM INC., and
15 AMAZON.COM, INC.,

16 Defendants.

17 CASE NO. 3:17-cv-05686-RJB

18 ORDER ON DEFENDANTS'
19 MOTIONS TO DISMISS

20 This matter comes before the Court on Defendant Google.Com, Inc.'s ("Google") Motion
21 to Dismiss (Dkt. 13) and Defendant Amazon.Com, Inc.'s ("Amazon") Motion to Dismiss (Dkt.
22 16). The Court has considered the pleadings filed regarding the motions and the remainder of the
23 record herein.

24 This case arises from the alleged sale of Plaintiff's books on Defendants' websites. Dkt.
25 4. Defendants now move for dismissal of the claims asserted against them pursuant to Fed. R.
26 Civ. P. 12 (b). Dkts. 13 and 16. For the reasons provided, the motions (Dkt. 13 and 16) should
27 be granted and the claims dismissed.

1 **I. FACTS AND PROCEDURAL HISTORY**

2 **A. FACTS**

3 On August 30, 2017, Plaintiff, a *pro se* prisoner, filed this case, moved to proceed *in forma*
4 *pauperis* (“IFP”), and provided a proposed complaint asserting that Defendants Amazon and
5 Google committed copyright infringement when Plaintiff’s books were sold on their website.
6 Dkts. 1, 1-1, and 4. Defendant Google is an Internet search engine which allows users to search
7 for online content and receive search results. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d
8 1146 (9th Cir. 2007). Defendant “Amazon is an online retailer that purports to offer ‘Earth’s
9 Biggest Selection of Products.’ Amazon has designed its website to enable millions of unique
10 products to be sold by both Amazon and third party sellers.” *Multi Time Mach., Inc. v.*
11 *Amazon.com, Inc.*, 804 F.3d 930, 933 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1231, 194 L. Ed.
12 2d 185 (2016).

13 According to the Complaint, Plaintiff and non-party Trafford Publishing Company
14 (“Trafford”) (Plaintiff has other lawsuits pending against Trafford) entered a contract in which
15 Trafford would publish and distribute Plaintiff’s books and would then pay Plaintiff the royalties
16 from the sales. Dkt. 4; *Casterlow-Bey v. Trafford Publishing Company*, Western District of
17 Washington case number 17-5459-RJB; Dkt. 7. Although Plaintiff asserts that he is the
18 copyright owner of the books (Dkt. 4), he does not allege that he registered any of them with the
19 United States Copyright Office.

20 Plaintiff’s Complaint further maintains that Google and Amazon “both sale all three of
21 Plaintiff’s published books universally without ever paying any royalty to Plaintiff for his
22 copyrighted works . . . in Japan, Amsterdam, German [sic] United Kingdom and elsewhere at
23 ridiculously astronomical prices.” Dkt. 4, at 2. He alleges that he has “no contract with [either

1 company] authorizing universal sales of his copyrighted work.” *Id.*, at 3. Plaintiff makes
2 reference to copyright infringement. *Id.* He seeks injunctive relief requiring Google and
3 Amazon to “cease and desist all sales” of his books until this case is resolved and an order that
4 they produce all sales records of his books. *Id.* Plaintiff also seeks several million dollars in
5 damages. *Id.*

6 **B. PLAINTIFF’S OTHER CASES RELATED TO HIS BOOKS**

7 On June 14, 2017, Plaintiff, proceeding IFP, filed a breach of contract case against Trafford,
8 who he alleges failed to pay him royalties on the three books that he wrote. *Casterlow-Bey v.*
9 *Trafford Publishing Company*, Western District of Washington case number 17-5459-RJB; Dkt.
10 7. An Answer to the Complaint (Dkt. 28) was filed for Trafford, and the parties are engaging in
11 discovery (Dkt. 46).

12 On August 30, 2017, Plaintiff filed a case against Ebay.com, asserting that Ebay.com
13 committed copyright infringement, breached a contract, and committed fraud when it sold
14 Plaintiff’s books. *Casterlow-Bey v. Ebay.com*, Western District of Washington case number 17-
15 5687 RJB, Dkt. 1-1. Plaintiff seeks injunctive relief and several million dollars in damages in
16 that case. *Casterlow-Bey v. Ebay.com*, Western District of Washington case number 17-5687
17 RJB, Dkt. 1-1. His application for IFP was granted. *Casterlow-Bey v. Ebay.com*, Western
18 District of Washington case number 17-5687 RJB, Dkt. 3. Ebay.com has appeared by counsel
19 and moved to dismiss the claims asserted against it, in part, based on Plaintiff’s failure to show
20 that his books are registered with the U.S. Copyright Office. *Casterlow-Bey v. Ebay.com*,
21 Western District of Washington case number 17-5687 RJB, Dkt. 7. Ebay.com’s motion to
22 dismiss was provisionally granted pending Plaintiff’s filing of an amended complaint, to in part,
23 address whether Plaintiff had registered his books with the U.S. Copyright Office and to address
24

1 other issues raised in the motions in that case. *Casterlow-Bey v. Ebay.com*, Western District of
2 Washington case number 17-5687 RJB, Dkt. 16.

3 On October 13, 2017, Plaintiff filed a case against “Barnes and Nobles,” moved for IFP, and
4 provided a proposed complaint asserting that Defendant “Barnes and Nobles” committed
5 copyright infringement, breached a contract, and committed fraud when it sold Plaintiff’s books.

6 *Casterlow-Bey v. Barnes and Nobles*, U.S. District Court for the Western District of Washington
7 case number 17-5834, Dkts. 1 and 1-1. Plaintiff also makes reference to the Racketeer
8 Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962, (“RICO”). *Casterlow-Bey v.*
9 *Barnes and Nobles*, U.S. District Court for the Western District of Washington case number 17-
10 5834, Dkt. 1-1. Plaintiff seeks several million dollars in damages. *Casterlow-Bey v. Barnes and*
11 *Nobles*, U.S. District Court for the Western District of Washington case number 17-5834, Dkt. 1-
12 1. His application for IFP was granted. *Casterlow-Bey v. Barnes and Nobles*, U.S. District
13 Court for the Western District of Washington case number 17-5834, Dkt. 4.

14 That same day, October 13, 2017, Plaintiff filed another case against Amazon, Google, Ebay,
15 Trafford, and “Barnes and Nobles,” moved for IFP, and asserted claims under RICO regarding
16 the sale and distribution of his books. *Casterlow-Bey v. Amazon.com, et al.*, Western District of
17 Washington case number 17-5833 RJB, Dkts. 1 and 1-1. His application for IFP was granted.
18 *Casterlow-Bey v. Amazon.com, et al.*, Western District of Washington case number 17-5833
19 RJB, Dkt. 4.

20 On October 25, 2017, Plaintiff filed *Casterlow-Bey v. Barnes and Nobles*, U.S. District Court
21 for the Western District of Washington case number 17-5871, moved for IFP, and provided a
22 proposed complaint again asserting that Defendant “Barnes and Nobles” committed copyright
23 infringement, breached a contract, and committed fraud when it sold Plaintiff’s books.

1 *Casterlow-Bey v. Barnes and Nobles*, U.S. District Court for the Western District of Washington
2 case number 17-5871, Dkts. 1 and 1-1. Plaintiff again made reference to RICO violations.
3 *Casterlow-Bey v. Barnes and Nobles*, U.S. District Court for the Western District of Washington
4 case number 17-5871, Dkt. 1-1. Plaintiff sought injunctive relief and several million dollars in
5 damages. *Casterlow-Bey v. Barnes and Nobles*, U.S. District Court for the Western District of
6 Washington case number 17-5871, Dkt. 1-1. His motion for IFP was denied because the case
7 was duplicative of the other cases he had already filed. *Casterlow-Bey v. Barnes and Nobles*,
8 U.S. District Court for the Western District of Washington case number 17-5871, Dkt. 4. After
9 being given an opportunity to pay the filing fee if he wished to continue with the case, the case
10 was dismissed for failure to pay the filing fee. *Casterlow-Bey v. Barnes and Nobles*, U.S.
11 District Court for the Western District of Washington case number 17-5871, Dkt. 5.

12 **C. PENDING MOTIONS IN THIS CASE**

13 Defendant Google moved to dismiss this case on November 20, 2017, asserting that
14 Plaintiff's claim for copyright infringement should be dismissed because he fails to allege that
15 any of his books have copyrights registered with the U.S. Copyright Office. Dkt. 13. It also
16 moves to dismiss arguing that Plaintiff fails to allege facts showing how it infringed on his works
17 or that any activity by Google occurred within the United States. *Id.* Defendant Amazon moved
18 to dismiss on November 21, 2017 on the same grounds. Dkt. 16.

19 The Court issued a notice to Plaintiff, as a *pro se* litigant, regarding Defendants' motions to
20 dismiss under Fed. R. Civ. P. 12 (b), and discussed Plaintiff's obligations, if he intended to
21 oppose the motion. Dkt. 17.

22 Plaintiff responded on December 12, 2017 and included attachments. Dkt. 23. Plaintiff
23 argues that “[i]t is undisputed that Defendants have engaged in ‘predicate acts’ that constitute an
24

1 ‘illegal pattern of racketeering activity’ dating back to 2006.” Dkt. 23, at 1-2. He maintains that
2 Defendants cannot claim ‘lawful sales’ of Plaintiff’s books because ‘all sales’ by Trafford
3 Publishing and third party distributors stem from falsified, forged, and fraudulent
4 contract/document that ultimately initiated national and international conspiracy to illegally
5 traffic in stolen property for financial gain.” *Id.*, at 3. Plaintiff argues that “Trafford Publishing,
6 through Defendants, have deprived Plaintiff of his legal earnings, none of the named Defendants
7 have legal authorization or justification under civil or criminal statutes to manufacture or
8 distribute Plaintiff’s copyrighted work.” *Id.* He asserts that the “exhibits attached to this motion
9 demonstrate Defendants’ involvement in sales of Plaintiffs’ copyrighted work not only in foreign
10 countries but all over the United States.” *Id.* Plaintiff also attaches documents entitled “Sales
11 and Royalties Page” and “Trafford Publishing Quarterly Royalty Report,” which purport to relate
12 to sales in the United States. Dkt. 23, at 5-7. Plaintiff also again asserts that he “owns the
13 copyrights to all (3) books published through Trafford, attached to this motion is a copy of
14 original contract outlining details of copyright/registration ownership, *i.e.* ‘Exhibit D’ page 3,
15 paragraphs 5.6 and 5.7.” *Id.* Exhibit D is entitled “Trafford Publishing Self-Publishing Services
16 Agreement.” Dkt. 23, at 8-18. Page three, paragraphs 5.6 and 5.7 provide:

17 **5.6 Copyright and Title Registration.** If purchased by You as part of Your
18 Services, We shall include a copyright notice in accordance with Your
19 instructions in each copy of the Work. We shall secure a unique International
20 Standard Book Number (ISBN) for each version of the work where applicable.
21 You may not use the formatted Manuscript (at any stage of development) or
22 finished Work, the ISBN, and/or cover with any other provider of similar Services
23 at any time during or after the term of this agreement.

24 **5.7 Rights to Manuscript and the Work.** There are generally three sets of
25 intellectual property rights that are included in any Work; (a) the first set of rights
26 relates to the Manuscript or Your Work. You shall remain the sole and exclusive
27 owner of all right, title, and interest in and to Manuscript and Your Work as
28 initially submitted to Us. We shall have no right or license to use any Manuscript
29 or Work except as permitted herein with respect to development of the resulting

1 book in print, digital, or audio format; (b) the second set of intellectual property
2 rights relates to content that We, Our employees, Our Affiliates or Our
3 Contractors create as part of the Services that We offer ("Our Work Product");
and (c) the third set of intellectual property rights relates to the content that We
own or that We license from third parties that We cannot transfer to You.

4 Dkt. 23, at 10.

5 Defendants have filed replies (Dkts. 20 and 21), arguing, in part, that they did not get a copy
6 of the attachments to Plaintiff's response. The motions are now ripe.

7 **II. DISCUSSION**

8 **A. MOTION TO DISMISS 12 (b)(1) STANDARD**

9 A complaint must be dismissed under Fed. R. Civ. P.12 (b)(1) if, considering the factual
10 allegations in the light most favorable to the plaintiff, the action: (1) does not arise under the
11 Constitution, laws, or treaties of the United States, or does not fall within one of the other
12 enumerated categories of Article III, Section 2, of the Constitution; (2) is not a case or
13 controversy within the meaning of the Constitution; or (3) is not one described by any
14 jurisdictional statute. *Baker v. Carr*, 369 U.S. 186, 198 (1962); *D.G. Rung Indus., Inc. v.*
15 *Tinnerman*, 626 F.Supp. 1062, 1063 (W.D. Wash. 1986); *see* 28 U.S.C. §§ 1331 (federal
16 question jurisdiction) and 1346 (United States as a defendant). When considering a motion to
17 dismiss pursuant to Rule 12 (b)(1), the court is not restricted to the face of the pleadings, but may
18 review any evidence to resolve factual disputes concerning the existence of jurisdiction.

19 *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988), *cert. denied*, 489 U.S. 1052
20 (1989); *Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983). A federal court
21 is presumed to lack subject matter jurisdiction until plaintiff establishes otherwise. *Kokkonen v.*
22 *Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994); *Stock West, Inc. v. Confederated*
23 *Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). Therefore, plaintiff bears the burden of proving the
24

1 existence of subject matter jurisdiction. *Stock West*, 873 F.2d at 1225; *Thornhill Publishing Co., Inc. v. Gen'l Tel & Elect. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979).

3 **B. COPYRIGHT INFRINGEMENT AND SUBJECT MATTER JURISDICTION**

4 Under the Copyright Act, “no civil action for infringement of the copyright in any United
5 States work shall be instituted until preregistration or registration of the copyright claim has been
6 made in accordance with this title.” 17 U.S.C. § 411(a). “A district court does not have subject
7 matter jurisdiction over an infringement claim until the Copyright Office grants the registration
8 application and issues a certificate of registration.” *Corbis Corp., v. Amazon. com, Inc.*, 351
9 F.Supp.2d 1090, 1112, 77 U.S.P.Q.2d 1182 (W.D.Wash. 2004); *Safeair, Inc. v. Airtran Airways, Inc.*, 09-5053RJB, 2009 WL 801754, at *2 (W.D. Wash. Mar. 25, 2009).

11 Plaintiff does not allege that he has certificates of registration from the Copyright Office on
12 any of his books in his complaint. A review of the records of the U.S. Copyright Office shows
13 that only one book, *Wildflower*, is registered with the U.S. Copyright Office to Plaintiff Gary
14 Casterlow-Bey; with the registration number: TXU001644896; date: 07-31-2009. Pursuant to
15 Federal Rule of Evidence 201 (b)(2), a “court may judicially notice a fact that is not subject to
16 reasonable dispute because it . . . can be accurately and readily determined from sources whose
17 accuracy cannot reasonably be questioned.” The “court may take judicial notice on its own” . . .
18 but if the “court takes judicial notice before notifying a party, the party, on request, is still
19 entitled to be heard.” Federal Rule of Evidence 201 (c)(1) and (e). “Judicial notice is appropriate
20 for records and reports of administrative bodies.” *United States v. 14.02 Acres of Land More or Less in Fresno Cty.*, 547 F.3d 943, 955 (9th Cir. 2008). To the extent that Plaintiff makes a
21 claim for copyright infringement against Defendants for any book other than *Wildflower*, the
22 claim should be dismissed for lack of subject matter jurisdiction under Rule 12 (b)(1).
23

24

1 The contractual provisions to which he points do not address whether he has registered the
2 books with the U.S. Copyright Office. Plaintiff has the burden to establish subject matter
3 jurisdiction. *Stock West*, 873 F.2d at 1225. Plaintiff's claims for copyright infringement should
4 be dismissed for lack of subject matter jurisdiction regarding any book other than *Wildflower*.
5 Moreover, this is the second time Plaintiff has been informed of this burden, and he has again
6 failed to provide evidence of certificates of registration. Plaintiff cannot simply rely on his own
7 allegations to demonstrate that the Court has subject matter jurisdiction.

8 **C. MOTION TO DISMISS 12 (b)(6) STANDARD**

9 Fed. R. Civ. P. 12 (b)(6) motions to dismiss may be based on either the lack of a cognizable
10 legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri*
11 *v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken
12 as admitted and the complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d
13 1295 (9th Cir. 1983). “While a complaint attacked by a Rule 12 (b)(6) motion to dismiss does
14 not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his
15 entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the
16 elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-55
17 (2007) (internal citations omitted). “Factual allegations must be enough to raise a right to relief
18 above the speculative level, on the assumption that all the allegations in the complaint are true
19 (even if doubtful in fact).” *Id.* at 555. The complaint must allege “enough facts to state a claim
20 to relief that is plausible on its face.” *Id.* at 547.

21 **D. COPYRIGHT INFRINGEMENT AND FAILURE TO STATE A CLAIM**

22 Under the Copyright Act, copyright owners have the exclusive right to do or authorize the
23 following:

- 1 (1) to reproduce the copyrighted work in copies or phonorecords;
2 (2) to prepare derivative works based upon copyrighted work;
3 (3) to distribute copies or phonorecords of the copyrighted work to the public by
4 sale or other transfer of ownership, or by rental, lease, or lending;
5 (4) in the case of literary, musical, dramatic, and choreographic works,
6 pantomimes, and motion pictures and other audiovisual works, to perform the
7 copyrighted work publicly;
8 (5) in the case of literary, musical, dramatic, and choreographic works,
9 pantomimes, and pictorial, graphic, or sculptural works, including the
10 individual images of a motion picture or other audiovisual work, to display the
11 copyrighted work publicly; and
12 (6) in the case of sound recordings, to perform the copyrighted work publicly by
13 means of a digital audio transmission.

14 17 U.S.C. § 106. “Plaintiffs must satisfy two requirements to present a prima facie case of direct
15 infringement: (1) they must show ownership of the allegedly infringed material and (2) they must
16 demonstrate that the alleged infringers violate at least one exclusive right granted to copyright
17 holders under 17 U.S.C. § 106.” *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1159 (9th
18 Cir. 2007).

19 Plaintiff’s claims for copyright infringement against both Defendants should also be
20 dismissed for failure to state a claim on which relief can be granted. Aside from failing to
21 establish that he is a copyright holder for any book other than *Wildflower*, Plaintiff has failed to
22 allege sufficient facts that either Google or Amazon violated at least one of the rights granted
23 under § 106. He does not give any details – only non-specific allegations that the Defendants
24 sold his books. Google properly points out that, as an online service provider, it is shielded from
many infringement claims under the safe harbor protections of the Digital Millennium Copyright
Act (“DMCA”), 17 U.S.C. § 512 (c)-(d), but is unable to glean even the most basic of facts from
Plaintiff’s complaint to know which, if any, of the DMCA’s provisions apply. Dkt. 13. Further,
“[i]t is well settled that the Copyright Act does not apply extraterritorially.” *Los Angeles News
Serv. C. Reuters Television Int’l, Ltd.*, 149 F.3d 987, 990-91 (9th Cir. 1998). Defendants

1 properly point out that Plaintiff's Complaint asserts copyright violations outside the United
2 States. His claims should also be dismissed for failure to state a claim on this basis as well.

3 To the extent Plaintiff asserts claims for secondary copyright infringement liability, his
4 claims should be dismissed.

5 To succeed in imposing vicarious liability for copyright infringement, "a plaintiff must
6 establish that the defendant exercises the requisite control over the direct infringer and that the
7 defendant derives a direct financial benefit from the direct infringement." *Perfect 10, Inc. v.*
8 *Amazon.com, Inc.*, 508 F.3d 1146, 1173 (9th Cir. 2007). "The 'control' element of the vicarious
9 liability test as the defendant's right and ability to supervise the direct infringer. *Id.* (internal
10 citations omitted).

11 Plaintiff fails to allege claims supporting a claim for vicarious liability because he does not
12 allege Defendants had the right to control the alleged infringing activity or derived a direct
13 financial benefit from the direct infringement. See *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d
14 1082, 1094 (C.D. Cal. 2001).

15 Plaintiff has failed to assert facts supporting a claim for contributory liability for copyright
16 infringement because he failed to allege infringement by a third party, or that Defendants
17 intentionally encouraged or induced infringement through "specific acts." *Perfect 10, Inc. v.*
18 *Amazon.com, Inc.*, 508 F.3d 1146, 1170 (9th Cir. 2007).

19 **E. OTHER CLAIMS MENTIONED IN RESPONSE**

20 Plaintiff appears to attempt to assert other claims in his response, including a reference to
21 fraud and "racketeering." These claims are not in the Complaint. Further, Plaintiff has asserted
22 these claims in another case against these Defendants. *Casterlow-Bey v. Amazon, et al.*, Western
23 District of Washington case number 17-5833-RJB; Dkt. 5.

F. LEAVE TO AMEND

2 Unless it is absolutely clear that no amendment can cure the defect, a *pro se* litigant is
3 entitled to notice of the complaint's deficiencies and an opportunity to amend prior to dismissal
4 of the action. *See Lucas v. Dep't of Corr.*, 66 F.3d 245, 248 (9th Cir.1995).

5 It is not absolutely clear that no amendment could cure the defects in Plaintiff's Complaint as
6 to the remaining claims. Although his success seems unlikely, Plaintiff should be afforded an
7 opportunity to amend his complaint in order to attempt to state a claim on his copyright
8 infringement claim. He should not rely solely on allegations that the Court has subject matter
9 jurisdiction over his copyright infringement claims (that the books are registered with the U.S.
10 Copyright Office), but should provide evidence of that registration, if any exists. Such
11 amendment, if any, should be filed on or before January 12, 2018. Plaintiff's failure to do so
12 may result in dismissal of the case. Plaintiff should **not** add additional claims or parties.

G. CONCLUSION

14 Defendants' motions should be granted and all Plaintiff's claims should be dismissed, unless
15 Plaintiff files an appropriate amended complaint. Plaintiff should be given until January 12,
16 2018 to file an amended complaint, if he chooses to do so. Plaintiff's failure to do so will result
17 in dismissal of the case.

III. ORDER

It is ORDERED that:

- Defendant Google.Com, Inc.'s Motion to Dismiss (Dkt. 13) **WILL BE GRANTED**, unless Plaintiff files a properly amended complaint, if any, is filed by **January 12, 2018**; failure to file will result in dismissal of the case.

- Defendant Amazon.Com, Inc.’s Motion to Dismiss (Dkt. 16) **WILL BE GRANTED**, unless Plaintiff files a properly amended complaint, if any, is filed by **January 12, 2018**; failure to file will result in dismissal of the case
 - The Motions to Dismiss (Dkts. 13 and 16) are **RENOTED** to **January 12, 2018**.

The Clerk is directed to send copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 29th day of December, 2017.

Robert J. Bryan

ROBERT J. BRYAN
United States District Judge